(1)

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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TYRONE DUFF,
Petitioner,

vs.

STATE OF NEVADA, ET.AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TYRONE DUFF
P.O.Box 2512
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QUESTION(S) PRESENTED

1. Whether the Ninth Circuit acted where it lacked the inherent power to act, in the jurisdiction of the Second Circuit, in order to affirm the district court's orders and judgment that conferred jurisdiction where none existed in the State of New York, which conflicts with the Second Circuit's decision in *Maestri v. Jutkofsky?*

2. Whether the Ninth Circuit decision violated the Nevada Revised Statutes and upheld a nonexistent crime against the Plaintiff, depriving him of his personal liberty; conviction of a nonexistent crime is not timed barred where it results in a void judgment not subject to waiver?

PARTIES TO PROCEEDING

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Tyrone Duff; *Plaintiff/Appellant/Petitioner*

State of Nevada, The Second Judicial District Court of the State of Nevada in and for the County of Washoe, the Honorable Scott T. Jordan, State of Nevada Attorney General's Office, Former Attorney General Frankie Sue Del Papa, Former Solicitor General P. Mark Ghan, Former Assistant Solicitor General Creighton Skau, Attorney General Brian Sandoval, Deputy Attorney General Daniel Wong (State Defendants); *Defendants/ Appellees/ Respondents*

Washoe County, Washoe County District Attorney's Office, Washoe County Department of Social Services, Former District Attorney Dorothy Nash Holmes, Former Deputy Attorney Ann Wilson (Andreini) Nelson, David Nason, Michelle Lucier (County Defendants); *Defendants/ Appellees/Respondents*

A.Stanyan Peck, Esq., Janice M. Peck, Kurt Mausert, Esq., Richard W. Lewis, Ph.D., Deborah P. Lewis, Daniel W. Dugan, Ph.D., Mary P. Dugan, Esq., Joel Barber, Esq., Ja Non Lee Barber, Walter B. Fey, Esq., Steven Klearman, Esq., Yolanda Foster, William Henry Foster, Martin Crowley, Esq.; *Defendants/ Appellees/Respondents*

CORPORATE DISCLOSURE STATEMENT

No parties are corporations, Sup. Ct. R. 29.6

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the memorandum and the judgment of the United States Court of Appeals for the Ninth Circuit in this case that conferred jurisdiction where none existed in the State of New York which conflicts with the existing authoritative decision of the United States Court of Appeals for the Second Circuit in *Maestri v. Jutkofsky* that substantially affects a rule of national application, where there is now an overriding need for national uniformity.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a–3a) is located at 2006 U.S. App. Lexis 30899 and are not for publication. The order of the court of appeals denying rehearing *en banc* (Pet. App. 17a) is unpublished. The opinions of the United States District Court, District of Nevada (Pet. App. 4a–9a) is located at 3:04-cv-0059-LRH-RAM Duff v. State of Nevada, et.al.

JURISDICTION

The memorandum and judgment of the United States Court of Appeals were entered on December 13, 2006. A timely petition for rehearing *en banc* was denied by the United States Court of Appeals for the Ninth Circuit on February 21, 2007. The jurisdiction of this Court is invoked under *28 U.S.C. §1254(1)*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides: "nor shall any person . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V

The Sixth Amendment provides: "to be informed of the nature and cause of the accusations . . to be confronted with the witness against him . ." U.S. Const. amend. VI

The Thirteenth Amendment provides: "Involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII

The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Title 42, Section 1983 of the United States Code provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. §1983.

Nevada Eighth Judicial District Court Rule (E.D.C.R.) – 5.22(d): An application requesting an extended protective

order must be based upon an affidavit(s) setting forth specific facts within the affiant's personal knowledge which justify the issuance of such an order.

Nevada Eighth Judicial District Court Rule 5.22(f): No extended protective order may be renewed beyond the statutory maximum period nor may a new extended order be granted based upon the filing of a new application which does not contain a new and distinct factual basis for the issuance of an order.

Nevada Revised Statues (N.R.S.) – 33.020(1): provided in pertinent part: An extended order for protection against domestic violence must not be granted to the applicant or the adverse party unless he has requested the order and has filed a verified application that an act of domestic violence has occurred or there exists a threat of domestic violence.

Nevada Revised Statute 33.080(3): An extended order expires within such time, not to exceed 1 year, as the court fixes. A temporary order may be converted by the court, upon notice to the adverse party and a hearing into an extended order effective for no more than 1 year.

Nevada Revised Statute 41.031(1) provides in pertinent part: The State of Nevada waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as applied to civil actions against natural persons except as otherwise provided in N.R.S. 41.032 to N.R.S. 41.038.

Nevada Revised Statute 41.0334(2) provides in pertinent part: Exceptions: (a) intentionally caused or contribute to by an officer or employee of the state or any of its agencies or political subdivisions; or (b) resulting from the deprivation of any rights, privileges or immunities secured by the United States Constitution or the constitution of the State of Nevada.

Nevada Revised Statute 41.0337: State or political subdivision to be named party defendant. No tort action arising out of an act or omission within the scope of his public duties or employment may be brought against any present or former: 1) Officer or employee of the state or any political subdivision; 2) Immune contractor; or 3) State legislator, unless the state or appropriate political subdivision is named a party defendant under N.R.S. 41.031.

Nevada Rules of Civil Procedure (N.R.C.P.) – 65(d): Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.

STATEMENT OF THE CASE

This case arises from the continuing unlawful restraint of the Petitioner Tyrone Duff (Plaintiff), now over thirteen (13) years, for a nonexistent crime through a blanket restraining order that was never adjudicated but fabricated on behalf of, including but not limited to, Kurt Mausert, Esq., who resides in the jurisdiction of the State of New York that has deprived the Plaintiff of his personal liberty guaranteed by the *Thirteenth Amendment,* which consist of his power of locomotion without imprisonment or restraint unless by due course of law; and his liberty of movement and freedom to remain in a place of his lawful choice guaranteed and protected by the constitutional provisions under the *Fifth* and *Fourteenth Amendments* that denotes not only his freedom from unauthorized physical restraint but embraces also his freedom as an individual to use and enjoy his faculties in all lawful ways without the constant threat of false arrest and false imprisonment and to live and work where he chooses and to engage in his lawful profession, a license Realtor.

Background History

District Judge Scott T. Jordan (Judge Jordan) acted without a cognizable cause of action before the court in the hearing held July 6-9, 1993 and entered a fabricated blanket restraining order against the Plaintiff for a nonexistent crime, in violation of *N.R.S. 33.020(1)*, *N.R.S. 33.080(3)*, *N.R.C.P. 65(d)* and *E.D.C.R. 5.22(d)(f)*, on behalf of Yolanda Foster, William Henry Foster (a five time convicted ex felon of extremely violent and volatile crimes), Washoe County Social Services Department (an entity of Washoe County entered as a natural person), Richard W. Lewis, Ph.D., Kurt Mausert, Esq. and A.Stanyan Peck, Esq. in his Findings of Fact, Conclusions of Law and Order (Judgment) July 27, 1993 in Nevada State Court case no. *D88-1238 Duff v. Duff (Duff v. Duff)*. When Judge Jordan entered the blanket restraining order in his Judgment, he unlawfully terminated the Plaintiff's "personal liberty" by keeping him permanently under compulsory restraint as a punishment for a nonexistent crime, which is a condition of involuntary servitude, without due process of law, through the act of coercion prohibited by the *Thirteenth Amendment*. It is legally impossible to convict the Plaintiff of a crime when he has never been charged with one, without Judge Jordan's participation in a conspiracy with the defendants to deprive him of his rights under color of state law, which rights are secured by the Constitution of the United States.

Judge Jordan, A.Stanyan Peck, Esq. and the Fosters, in October 1995 (Pet. App. 18a), attempted to have the Plaintiff placed under arrest and imprisoned for violating the blanket restraining order and auto theft of his own vehicle, instituting a false criminal prosecution against him for a crime not contemplated by him, where Judge Jordan and Peck knew the blanket restraining order, pursuant to *N.R.S. 33.080(3)*, expired by statutory law on July 27, 1994 and therefore was unenforceable.

Judge Jordan's order, filed December 12, 1994 in *Duff v. Duff* (Pet. App. 10a) states Kurt Mausert, Esq. relocated to the State of New York. Yet his order, filed March 5, 1998, denied the Plaintiff's motion to remove his blanket restraining order (Pet. App. 12a) against him on behalf of, including but not limited to, Kurt Mausert, Esq., that pursuant to *N.R.S. 33.080(3)* expired by statutory law on July 27, 1994. The orders, filed December 12, 1994 and March 5, 1998, clearly established Judge Jordan's assumption of authority outside the geographic boundaries of his office in the jurisdiction of the State of New York and his violation of the *Nevada Revised Statutes,* when he upheld and enforced his blanket restraining order on behalf of Kurt Mausert, Esq.. Martin Crowley, Esq. withdrew as the attorney of record on behalf of the Plaintiff on October 15, 1998.

The Plaintiff proceeded in pro se October 15, 1998 and in 1999 subpoenaed those listed in the blanket restraining order for all documents in support of their restraint of him, in *Duff v. Duff.* A.Stanyan Peck, Esq.'s responded with a motion for protective order/stay of discovery and declared in his affidavit (Pet. App. 20a), dated April 7, 1999, there were never any documents filed with the court, pursuant to *N.R.S. 33.020(1)* and *E.D.C.R. 5.22(d),* requesting the restraint of the Plaintiff on behalf of, including but not limited to, himself – A.Stanyan Peck, Esq.

The Washoe County District Attorney responded to the subpoena with a letter, dated April 19, 1999 (Pet. App. 23a) that clearly states his office never filed any documents with the court, in *Duff v. Duff*, requesting the restraint of the Plaintiff on behalf of Washoe County Social Services Department or any other party listed in the blanket restraining order.

Kurt Mausert, Esq. responded to the subpoena with a letter, dated June 21, 1999 (Pet. App. 25a), where he stated he has not been involved in *Duff v. Duff* for nearly five (5) years and all supporting documents for his restraint of the Plaintiff in the State of New York, including but not limited to the order of March 5, 1998, would be on file with the Second Judicial District Court of the State of Nevada in and for the County of Washoe and would have been served upon the Plaintiff, who has resided in Bellingham, Washington since May 1994.

Richard W. Lewis, Ph.D. refused to comply with the subpoena, in 1999, for all documents in support of his restraint of the Plaintiff, in *Duff v. Duff*, including but not limited to the order of March 5, 1998 and the court refused to hold him in contempt. Lewis was found guilty on the Plaintiff's complaint, filed August 26, 1993, in his disciplinary hearing before the Nevada State Board of Psychological Examiners, May 20, 1995, of giving false testimony in the Plaintiff's child custody hearing held July 6-9, 1993. The Board entered its Findings of Fact, Conclusions of Law and Order, July 20, 1995, which Lewis never appealed and it has never been overturned.

Yolanda Foster and William Henry Foster refused to comply with the subpoena, in 1999, for all documents in support of their restraint of the Plaintiff, in *Duff v. Duff*, including but not limited to, the order of March 5, 1998 and the court refused to hold them in contempt. Washoe County District Attorney's letter clearly states the Fosters never filed any documents requesting the restraint of the Plaintiff and is further confirmed by A.Stanyan Peck, Esq.'s affidavit, dated April 7, 1999.

Plaintiff brought an action before the state court on March 2, 2000 against the State of Nevada and the Honorable Scott T. Jordan, et.al., where he alleged Judge Jordan participate

in a conspiracy against his rights, under color of state law, to keep him under unlawful restraint for a nonexistent crime through his blanket restraining order that expired by statutory law on July 27, 1994, which he held in his order, filed March 5, 1998, it will remain in full force and effect on behalf of, including but not limited to, Kurt Mausert, Esq. in the State of New York, where he entered it in his Judgment. This continued to deprive the Plaintiff of his personal liberty guaranteed by the *Thirteenth Amendment* and his liberty and freedom guaranteed by the *Fifth* and *Fourteenth Amendments,* without due process of law. The Plaintiff's complaint was filed within the Nevada statute of limitation, pursuant to *N.R.S. 11.190(4)(e).*

The state court's order, filed October 2, 2000, dismissed the Plaintiff's complaint as frivolous and without merit and upheld the order of March 5, 1998, in *Duff v. Duff* and held Judge Jordan's blanket restraining order entered in his Judgment will remain in full force and effect even though it expired by statutory law in 1994. The state court further held Judge Jordan's assumption of authority outside the geographic boundaries of his office in the jurisdiction of the State of New York were not only judicial in nature but were within his jurisdiction and unquestionably were within his scope of judicial immunity. The Supreme Court of Nevada affirmed the state court's order on May 7, 2003 and denied the Plaintiff's Petition for rehearing on June 18, 2003.

The Plaintiff was not aware of the injury and damages the defendants caused him until the Supreme Court of Nevada, on June 18, 2003, conferred jurisdiction where none existed in the State of New York and upheld and permanently enforced Judge Jordan's blanket restraining order against him for a nonexistent crime on behalf of, including but not limited to, Kurt Mausert, Esq. that pursuant to *N.R.S. 33.080(3)* expired by statutory law on July 27, 1994.

Procedural History

The Plaintiff brought an action for redress under *42 U.S.C. §1983, §1985* and *§1986* before the United States District Court, District of Nevada on February 12, 2004, where he alleged the defendants acted in a conspiracy against his rights to keep him under unlawful restraint, indefinitely, for a nonexistent crime, which caused the deprivation of his constitutional and civil rights, under color of state law. The district court has jurisdiction for cases that arise under federal law. A claim under *42 U.S.C. §1983* arises under federal law. Plaintiff's complaint, pursuant to *N.R.S. 11.190(4)(e),* was within the Nevada statue of limitations of two (2) years, where the Supreme Court of Nevada filed its order June 18, 2003.

The district court granted the defendants' motions to stay all discovery pending its disposition on their motions to dismiss that denied the Plaintiff his right to the equal protection of the laws by denying him discovery, pursuant to *Fed.R.Civ.P. 26(b)*, on an extremely important matter that involves the termination of his personal liberty, guaranteed by *the Thirteenth Amendment* and his liberty of movement and freedom to remain in a place of his lawful choice, guaranteed by *the Fifth and Fourteenth Amendments,* where the defendants failed to produce any admissible evidence that the Plaintiff was ever charged with a crime.

The district court granted the defendants' motions to dismiss based on *F.R.C.P. 12(b)(6), the Rooker/Feldman doctrine, absolute quasi judicial immunity, prosecutorial immunity*, the State of Nevada's *sovereign immunity* under *the Eleventh Amendment* and *the statute of limitations* and granted the Lewis' Defendants' motion for judgment on the pleadings (Pet. App. 4a) on January 27, 2005 and entered its' judgment on August 17, 2005 (Pet. App. 9a) in favor of the defendants and against the Plaintiff.

The Ninth Circuit affirmed the dismissal of the Plaintiff's complaint and held the district court did not abuse its discretion by staying discovery pending resolution of the defendants' motions to dismiss. Pet. App. 1a-3a. Plaintiff timely filed his Petition for Rehearing and Rehearing En Banc to the Ninth Circuit that was denied on February 21, 2007. Pet. App. 17a.

REASON FOR GRANTING THE PETITION

I. The Ninth Circuit acted where it lacked the inherent power to act, in the jurisdiction of the Second Circuit in order to affirm the district court's orders and judgment that conferred jurisdiction where none existed in the State of New York, which conflicts with *Maestri v. Jutkofsky.*

The district court impeached its own orders and judgment where it lacked authority to act when it conferred jurisdiction where none existed in the State of New York, as in *People ex rel. Gowdy v. Baltimore & Ohio R.R. Co.*, 385 Ill. 86, 92, 52 N.E. 2d 255 (1943). The Plaintiff, as in *Maestri v. Jutkofsky,* 850, F.2d 50, 53 (2nd Cir. 1988) [*28] cert. denied, 489, U.S. 1016, 109 S.Ct. 1132, 103 L.Ed. 2d 193 (1989), relied upon the district court to reject Judge Jordan's judicial immunity defense, where his orders, filed December 12, 1994 and March 5, 1998 in *Duff v. Duff,* clearly establish he acted in the 'clear absence of all jurisdiction' and unquestionably acted outside the scope of his judicial immunity when he assumed authority outside the geographic boundaries of his office in the jurisdiction of the State of New York and upheld and enforced his blanket restraining order against the Plaintiff for a nonexistent crime on behalf of, including but not limited to, Kurt Mausert, Esq., is the kind of clear judicial usurpation which cannot be condoned by any grant of judicial immunity. No public policy would be served by granting immunity for such an arrogant excesses of authority.

The Supreme Court has made clear in *Mireles v. Waco*,502 U.S. 9, 10 (1991), "judicial immunity is overcome in only two sets of circumstance, first a judge is not immune from liability for nonjudicial actions and second a judge is not immune for actions, though judicial in nature, take in the complete absence of all jurisdiction."

When the district court conferred jurisdiction where none existed in the State of New York, it entered a decision that conflicts with *Maestri v. Jutkofsky*. The district court knew a judge only has authority to act within the geographic boundaries of the jurisdiction of the court in which he presides; outside of that jurisdiction the judge is not acting in his judicial capacity, where it is not judicial in nature nor is it a judicial function normally performed by a judge to assume authority in the jurisdiction of another state. See *Ableman v. Booth*, 62 U.S. 514 (1859); *Bradley v. Fisher*, 80 U.S. 355 (1872); *Stump v. Sparkman*, 435 U.S. 349 (1978). The mere fact that a judge commits an act does not make the act judicial in nature. In such cases the judge has lost his judicial function, has become a mere private person, and is liable as a trespasser for damages resulting from his unauthorized acts. Where there is no jurisdiction there is no judge; the proceeding is nothing. Such has been the law from the days of the *Marchalsea*, 10 Coke 68; *Bradley v. Fisher*, 13 Wall 355, 351. *Manning v. Ketcham*, 58 F.2d 948 (1932).

Maestri is the leading Second Circuit case establishing the test for determining what is 'absence of jurisdiction'. The case makes it quite clear that there is a difference between an action that is 'erroneous' or even in 'excess of jurisdiction' and one that is in 'the clear absence of all jurisdiction over the subject matter' which absolute judicial immunity is unavailable. See *Ashelman v. Pope*, 793, F.2d. 1075 (9th Cir. 1986); *Tucker v. Outwater*, 118 F.3d 930, 932 (2nd Cir. 1997). The Supreme Court held in *Pulliam v. Allen*, 466 U.S. 522 (1984), that judicial immunity does not insulate state

judges from claims for equitable relief *42 U.S.C. §1983.* The Plaintiff relied upon the district court to reject any immunity defense by the State and County Defendants, where it knew, as in *Rankin v. Howard*, (1980) 633 F.2d 844, cert. den., *Zeller v. Rankin*, 101 S.Ct. 2020, 451 U.S. 939, 68 L.Ed. 2d 326 (1980), they acted in the face of clearly valid statutes and case law expressly depriving them of authority and jurisdiction, their immunity was lost and they would be liable. *Dykes v. Horsemann*, 743 F.2d 1488 (1984); *Duty v. City of Springdale, Ark.*, 42 F.3d 460, 462 (8th Cir. 1994); *Forrester v. White*, 484 U.S. at 227-228 (1988).

The district court acted under color of law against the Plaintiff's constitutional and civil rights when it not only upheld Judge Jordan's blanket restraining order on behalf of Kurt Mausert, Esq., where it lacked authority to enforce it in the jurisdiction in the State of New York, but granted Mausert's defense of *absolute quasi judicial immunity* for his years of unlawful restraint of the Plaintiff for a nonexistent crime in the State of New York. The official seeking the immunity bears the burden of showing that such immunity is justify for the function in question. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 113 S.Ct. 2606, 2613 (1993)(citing *Burns v. Reed*, 500 U.S. at 486 (1991); *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432, and n.4, 113 S.Ct. 2167 (1993)). The district court knew it was legally impossible to grant Mausert's immunity, where Judge Jordan's order, filed December 12, 1994 in *Duff v. Duff*, granted his oral motion to withdraw and states he relocated to the State of New York. Had Mausert been entitled to *absolute quasi judicial immunity*, in *Duff v. Duff*, he would have been represented by the Nevada Attorney General's office as an immune contractor with Judge Jordan and not by a private law firm. See *Kalina v. Fletcher*, 118 S.Ct. 502, 505 (1997).

The district court's abuse of discretion is evident when it left the jurisdiction of the State of Nevada and assumed authority in the jurisdiction of the State of New York; any authority exercised is usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. *Stump v. Sparkman*, 435 U.S. 349, 55 L.Ed. 2d 339, 98 S.Ct. 1099 (1978)(quoting *Bradley v. Fisher*, 13 Wall, 351-352. 20 L.Ed. 646 (1872)). Where there is no jurisdiction, there can be no discretion, for discretion is incident to jurisdiction. *Piper v. Pearson*, 2 Gray 120 (Mass. 1854), cited in *Bradley v. Fisher*, 80 U.S. 355 (1872).

The State and County Defendants pierced not only their *judicial, prosecutorial, absolute* and *qualified immunity* but also pierced the State of Nevada's *sovereign immunity* provided under *the Eleventh Amendment*, when they acted in direct violation of the *Nevada Revised Statutes* and unlawfully withheld exculpatory evidence and evidentiary facts through their continuing conspiracy with the other defendants that caused the Nevada State Court and the Supreme Court of Nevada to act where they lacked the inherent power to act in the jurisdiction of the State of New York and upheld and enforce the blanket restraining order, keeping the Plaintiff under compulsory restraint for a nonexistent crime on behalf of, including but not limited to, Kurt Mausert, Esq. that expired by statutory law on July 27, 1994. See *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The Supreme Court has articulated in *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982)(citing *Procunier v. Navarette,* 434 U.S. 555, 565 S.Ct. 855, 861 (1978) "that government officials performing discretionary functions generally are shield from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have known." "[S]ince *Ex Parte Young*, 209 U.S. 123 (1908), "we said, 'it has been settled that the Eleventh

Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under color.'" See *Hafer v. Melo*, 502 U.S. 21 (1991); *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Papasan v. Allain*, 478 U.S. 265, 278, 282 (1986); *Milliken v. Bradley*, 433 U.S. 267, 289 (1977).

By suing the State and County Defendants in their official capacities, the Plaintiff is essentially suing the State of Nevada. Under *N.R.S. 41.031(1), N.R.S. 41.0334(2)(a)(b)* and *N.R.S. 41.0337(1)(2)(3)* describes in detail conditions and limitations on a *Section 1983* action against the State of Nevada. In *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n.55 (1978), held "an official-capacity suit is typical way in which we have held states responsible for their duties under federal law. Such suit, "general represent[s] only another way of pleading action against an entity of which an officer is an agent. See *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 (1984); *Pembauer v. City of Cincinnati*, 475 U.S. 469, 483-84, 106 S.Ct. 1292, 1300, 89 L.Ed. 2d 452 (1985). This is further explained in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 59 (1989).

Washoe County District Attorney's letter, dated April 19, 1999, clearly establishes the County and State Defendants acted in a conspiracy with the other defendants, under color of State law, that violated the *Nevada Revised Statutes* and terminated the Plaintiff's personal liberty by conspiring to keep him under unlawful restraint for a nonexistent crime on behalf of, including but not limited to, Washoe County Social Services Department through the act of coercion, which is confirmed by A.Stanyan Peck, Esq.'s affidavit, dated April 7, 1999. See *United Steel Workers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1541 (9th Cir. 1989). *In re Oliver*, 33 U.S. 257, 68 S.Ct. 499 (1948), it is "the law of the land" no man's

life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal. The United States Supreme Court, in Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 1687 (1974) held "when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution and he is in that case stripped of his official or representative character and is subject in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

The district court violated due process and acted against the Plaintiff's rights, under color of law, to remove the liability of the defendants when it conferred jurisdiction where none existed in the State of New York and upheld and enforced the blanket restraining order that expired by statutory law in 1994 in order to keep him under unlawful restraint, indefinitely, for a nonexistent crime, that terminated his personal liberty through the act of coercion, which is a condition of involuntary servitude without due process of law, prohibited by *the Thirteenth Amendment,* that the Ninth Circuit affirmed and if left unchanged overturns *Maestri v. Jutkofsky* and grants the United States District Court, District of Nevada the power to act in the face of clearly valid statutes and case law expressly depriving it of jurisdiction and exercise its authority in the jurisdiction of any state. See *Cooper v. Aaron,* 358 U.S. 1, 78 S.Ct. 1401 (1958).

II. The Ninth Circuit violated the Nevada Revised Statutes and upheld a nonexistent crime against the Plaintiff, depriving him of his personal liberty; conviction of a nonexistent crime is not timed barred, where it results in a void judgment not subject to waiver.

The Ninth Circuit held the district court properly dismissed the Plaintiff's claims as timed barred, citing *Trimble v. City of Santa Rosa*, 49 F. 3d 593, 585 (9th Cir. 1995)(per curiam); *N.R.S. 11.109(4)(e)*. The statute of limitations does not apply in this case, where a legal exception applies. See *Heck v. Humphrey*, 512 U.S. 477 (1994). Here, the Plaintiff remains under unlawful restraint todate as he was when the blanket restraining order was entered in the Judgment in 1993 and the defendants have failed to produce any admissible evidence, whatsoever, that he was ever charged with a crime; - where they cannot establish a crime there can be no subject matter jurisdiction before the court for the issuance of the blanket restraining order and the court's finding that it had the power can add nothing to its authority; - it had no authority to make that finding. *People v. Brewer*, 328 Ill. 472, 483 (1928). Conviction of a nonexistent crime results in a void judgment not subject to waiver. *People v. McCarty*, 94 Ill. 2d. 37 (1983). A judgment is characterized as void and may be collaterally attacked at any time in any court, where the record itself furnished the facts which establish that the court acted without jurisdiction. *People v. Byrnes*, 34 Ill. App. 3d 983, 341 N.E. 2d 729 (2nd Dis. 1975). Since a void judgment has no legal force or effect there can be no time limits which to challenge the judgment. Further, since the judgment has no legal force or effect, it can be repeatedly challenged, since no judge has the lawful authority to make a void judgment valid. *Bates v. Board of Ed., Allendale Comm. Consolidation School Dist. No. 17*, 136 Ill. 2d 260, 267 (1990).

The district court conferred jurisdiction where none exited and made a void proceeding valid in order to uphold and enforce a nonexistent crime against the Plaintiff on behalf of, including but not limited to, Kurt Mausert, Esq. in the State of New York, which is confirmed by the Washoe County District Attorney's letter, A.Stanyan Peck, Esq.'s affidavit, Kurt Mausert, Esq.'s letter and by the record itself in *Duff v.*

Duff. See *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 497, N.E. 2d 1156 (1986).

If a federal Plaintiff asserts as a legal wrong an allegedly illegal act by the adverse parties, *Rooker/Feldman* does not bar jurisdiction. The legal wrong that the Plaintiff asserts in this action is not an erroneous decision by the state court but the continue enforcement by the defendants of the blanket restraining order for a nonexistent crime that violates the statutes and confers jurisdiction where none existed in the State of New York that the Plaintiff asserts is unconstitutional. In other words, Plaintiff asserts as a legal wrong "an allegedly illegal act . . by the adverse parties". *Noel v. Hall*, 341 F.3d at 1164 (9th Cir. 2003). Under these circumstances, *Noel* makes clear that *Rooker/Feldman* does not apply. The duty of the court to vacate a void judgment is based on the inherent power of a court to expunge from its records void acts of which it has knowledge. *People v. Childs*, 278 Ill. App. 3d 65, 663 N.E. 2d 161 (4th Dist. 1996). The district court had a judicial duty to vacate the Judgment as unconstitutional and set the Plaintiff at liberty and hold those liable for that deprivation. See *R.W. Sawant & Co. v. Allied Programs Corp.*, 111 Ill. 2d 304, 309, 489 N.E. 1360 (1986); *Kelcup v. McManus* (1964 Wash.) 2d 771, 394 P.2d 375, 379.

The *Feldman*, 460 U.S. 462-483 n16 (1983) or *Rooker/ Feldman doctrine* does not preclude a federal district court from exercising jurisdiction under *42 U.S.C. §1983*. Interfere with Civil Rights is a federal crime committed by the state court itself which would have to hear its own case against itself. Jurisdiction is given under *28 U.S.C. §1343(a)(1)(2)* and *28 U.S.C. §1257*, District Courts have original jurisdiction over civil actions, or those based on deprivation of rights. Actions involving deprivation of rights under color of authority are within the jurisdiction of the Federal Court and is given under *28 U.S.C. §1343(a)(3)*.

The District Courts have original jurisdiction of any civil action to redress that deprivation, under color of state law, of any Constitutional or Congressional act providing for equal rights of citizens or persons within the United States jurisdiction. *Under 42 U.S.C. §1985(2)*, which proscribes conspiracies depriving persons of rights or privileges including the right to equal protection of the laws. *Federal Civil Rights Act* (2d Ed) ss 276-277. *Under 42 U.S.C. §1985(3)*, which also proscribes conspiracies depriving person of rights or privileges including the right to equal protection of the laws, and *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 122 (1993). "To maintain an action under *(42 USC) 1983*, it is not necessary to allege or prove that the defendants intended to deprive Plaintiff of his Constitutional Rights or that they acted willfully, purposely, or in furtherance of a conspiracy . . it is sufficient to establish that the deprivation . . was the natural consequences of Defendants acting under color of law . ." *Ethridge v. Rhodos*, D.C. Ohio 268 F. Supp. 83 (1967); *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969); *Whirl v. Kern*, CA 5 Texas 407 F. 2d 781 (1968).

At no given time since Plaintiff has brought the violation of his constitutional and civil rights, under color of state law, forward have, including but not limited to, the State and/or County Defendants taken the appropriate action to correct the wrong against the Plaintiff and remove the unlawful restraint for a nonexistent crime by vacating the Judgment and setting him at liberty but have continued to act in a conspiracy to keep him under that unlawful restraint through the act of coercion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *United States v. Price*, 383 U.S. 787, 794 (1966); *McNeese v. Board of Ed.*, 373 U.S. 668 (1963); *Monroe v. Pape*, 365 U.S. 167 (1961). The district court has continued that deprivation of the Plaintiff's constitutional and civil rights, under color of law, in order to remove the liability from the defendants when it denied him his constitutional rights to

proceed with an action to remove the blanket restraining order by vacating the Judgment as unconstitutional and void under law, of no legal force or effect, where it was legally impossible for the state court to convict him of a crime he has never been charged with. See *In Coy v. Iowa,* 487 U.S. at 1015, 1021 (1988); *Cole v. Arkansas*, 333 U.S. 196 (1948); *Chambers v. Florida*, 309 U.S. 227 (1940).

When the district court denied the Plaintiff his procedural due process rights and his right to the equal protection of the laws by denying him any discovery, pursuant to *F.R.C.P. 26(b)*, it deprived him of his *Sixth Amendment Rights,* where the blanket restraining order not only violated the *N.R.S. 33.020(1), N.R.S. 33.080(3), N.R.C.P. 65(d)* and *E.D.C.R. 5.22(d)* but pursuant to *E.D.C.R. 5.22(f),* each of the parties listed in it would have had to file a new application every year, for thirteen (13) years, which contains a new and distinct factual basis for the restraint of the Plaintiff, had it been issued through due process of law. See *James v. Borg*, 24 F. 3d 20, 24 (9th Cir.), cert. denied, 115 S.Ct. 333 (1994); *Gray v. Raines*, 662 F.2d 569, 571 (9th Cir. 1991); *Sheppard v. Rees*, 909 F.3d 1234, 1236 (1990). It is legally impossible for the Nevada State Court to have subject matter jurisdiction for the restraint of the Plaintiff on behalf of Kurt Mausert, Esq. in the State of New York. See *Ex Parte State of Virginia,* 100 U.S. 399, 346-47 (1879).

The district court held the Plaintiff did not state a claim upon which relief can be granted. All that the Plaintiff must plead to satisfy *F.R.C.P. 12(b)(6)* is that he was and continues to be harmed by a constitutional violation and that the defendants are responsible for that violation. *Collins v. Harker Hights*, 503 U.S. 115, 120 (1992); *Santiago v. Philadelphia*, 435 F. Supp. 136 (D.C. Pa. 1977). The Eleventh Circuit in Rowe v. Fort Lauderdale, 2002 U.S. App. 885, *19n. 10, 15 Fla. Weekly Fed. At C241 n. 10 (11th Cir. 2002) held, "Case law is not always necessary to clearly

always necessary to clearly establish a right. A right may be so clear from the text of the Constitution or federal statute that no prior decision is necessary to give clear notice of it to an official. Also, a general constitutional rule set out in preexisting case law may apply with obvious clarity to the specific circumstances facing the official. The official's conduct may be so egregious that an objective and reasonable official must have known it was unconstitutional even without any fact-specific case law on point."

CONCLUSION

This Court should grant a writ of certiorari, where the Ninth Circuit acted where it lacked the inherent power to act in the jurisdiction of the Second Circuit and in direct violation of the *Nevada Revised Statutes* and entered a decision that conflicts with the existing authoritative decision by the Second Circuit's in *Maestri v. Jutkofsky*, which was upheld by the Supreme Court of the United States.

Respectfully Submitted,

Tyrone Duff
P.O.Box 2512
Bellingham, WA. 98227
(360) 752-1775

APPENDIX A – MEMORANDUM * OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AND ENTERED DECEMBER 13, 2006

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-16812
D.C. No. CV-N-04-00059-LRH

TYRONE DUFF,
Plaintiff – Appellant,

v.

STATE OF NEVADA; et.al.,
Defendants – Appellees.

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted December 4, 2006 **

Before: GOODWIN, LEAVY, and FISTHER,
Circuit Judges

Tyrone Duff appeals pro se from district court's judgment dismissing his civil rights alleging a conspiracy

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed.R.App.P. 34(a)(2).

to violate his constitutional rights in state divorce and child custody proceedings. We have jurisdiction under 28 U.S.C. §1291. We review de novo, *Noel v. Hall*, 341 F. 3d 1148, 1154 (9th Cir. 2003)(*Rooker-Feldman* doctrine); *Thompson v. City of Los Angeles*, 885 F. 2d 1439, 1442 (9th Cir. 1989)(failure to state a claim), and we affirm.

The district court properly dismissed Duff's claims against the Second Judicial District Court as barred under the *Rooker-Feldman* doctrine. *See Noel,* 341 F. 3d at 1164. The district court properly dismissed Duff's claims against a state court judge and individual state attorneys based on judicial and prosecutorial immunity, *see Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986), and properly dismissed his claims against the remaining state defendants as barred by the Eleventh Amendment, *see Thompson,* 885 F.2d at 1442-43.

The district court properly dismissed Duff's claims against the remaining defendants as time-barred. *See Trimble v. City of Santa Rosa*, 49 F.3d 593, 585 (9th Cir. 1995)(per curiam); Nev. Rev. Stat. 11.190(4)(e)(two-year limitations period for personal injury claims).

Contrary to Duff's contention, the district court did not abuse its discretion by staying discovery pending resolution of the defendants' motions to dismiss. *See Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981)(per curiam).

Duff's remaining contentions are not persuasive.

Duff's motion to strike is denied.

AFFIRMED.

APPENDIX B – JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AND ENTERED DECEMBER 13, 2006

No. 05-16812
D.C. No. CV-N-04-00059-LRH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TYRONE DUFF,
Plaintiff – Appellant,

v.

STATE OF NEVADA; et.al.,
Defendants – Appellees.

Appeal from the United States District Court for the District of Nevada (Reno).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada (Reno) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this case be, and hereby is **AFFIRMED**.

Filed and entered 12/13/06

APPENDIX C – ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA ENTERED JANUARY 27, 2005

Case No. CV-N-04-0059
Hon. Larry R. Hicks

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TYRONE DUFF,
Plaintiff,

v.

STATE OF NEVADA, et.al.,
Defendants.

DATED: January 26, 2005

On December 16, 2004, this Court issued orders (Docket Nos. 136, 137, 138, 139, 140 & 141) granting motions to dismiss brought by various Defendants and requiring Plaintiff to show cause as to why his complaint against Defendant Crowley should not be also dismissed, due to Plaintiff's failure to file an opposition to Defendant Crowley's motion. Various pleadings are presently before the Court. In response to this Court's order to show cause, Plaintiff has filed a pleading entitled "Response to This Court's Order . . . To Show Cause . . ." (Docket No. 144), as well as an opposition (Docket No. 145) to Defendant Crowley's Motion to Dismiss (Docket No. 18). Also before the Court is a Motion for Judgment on the Pleadings (Docket No. 135) filed by Defendants Dr. Richard W. Lewis and Deborah P. Lewis (the "Lewis Defendants"). Plaintiff has filed an opposition (Docket

No. 142), to which Defendants subsequently replied (Docket No. 143). Additionally, Plaintiff has filed a "Motion for the Immediate Disqualification and Recusal of United States District Judge Larry R. Hicks and United States Magistrate Judge Robert A. McQuaid, Jr. Pursuant to 28 U.S.C. §455(a)(b)(1)" (Docket No. 146). Upon review of the record and relevant law, the Court makes the following disposition:

A. Defendant Crowley's Motion to Dismiss

With regards to Defendant Crowley's Motion to Dismiss (Docket No. 18), the Court finds Defendant's statute of limitations defense conclusive. Accordingly to the Complaint, the conduct for which Defendant Crowley has been sued is his breach of attorney/client confidentiality on or about October 11, 1993. (Pt.'s Compl. At 26:1-7). Despite this Court's previous rulings which attempted to explain to Defendant the statute of limitations applicable for §1983 suits, Plaintiff continues to assert arguments on which this Court has already rule. Plaintiff claims that the statute of limitation "has no legal authority or effect where [there] is conclusive evidence . . that Judge Jordan acted without subject matter jurisdiction . ." (Pt.'s Opp. At 13:10-16). Plaintiff also asserts that no statute of limitations is applicable to §1983. (Id. at 13:5-9).

According to Plaintiff's first argument, the alleged misconduct of the state judge somehow alleviates Plaintiff's burden of filing his claims against Defendant Crowley within the applicable limitations period. Plaintiff has not provided any legal authority for this proposition and it is clearly contrary to long-established law. Moreover, even if a finding of fact regarding the appropriateness of the state judge's order were relevant to

Defendant Crowley's motion for dismissal, under the Rooker-Feldman doctrine, this Court has no jurisdiction to review the state court's decision. *See e.g. Noel v. Hall*, 341 F.3d 1148, 1163 (9th Cir. 2003. *See also Lahey v. Contra Costa County Dept. of Children and Family Services*, 2004 WL 2055716, *8 (N.D. Cal. 2004)(holding that plaintiffs cannot "bring federal claims that would ask district courts to pass judgment on state court findings").

Secondly, it is well-established that §1983 suits are subject to the limitations period provided for by the state of limitations for personal injury claims. *See Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995)(per curiam); *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938 (1985). In Nevada, personal injury claims are subject to a two year statute of limitations. See Reynolds v. Wolf, 916 F. Supp. 1018, 1021-22 (D. Nev. 1996)(citing Nev. Rev. Stat. §11.190(4)). Plaintiff's allegations against Defendant Crowley all regard conduct that occurred in 1993, well beyond the applicable statute of limitations. The Court therefore finds dismissal of the complaint against Defendant Crowley appropriate.

B. The Lewis Defendants' Motion for Judgment on the Pleadings

Also because the Court is a Motion for Judgment on the Pleadings (Docket No. 135) filed by the Lewis Defendants. The Lewis' involvement in this action began in April 1993, when Judge Jordan, who presided over a legal dispute in which Plaintiff was a party, issued an order appointing Richard W. Lewis, Ph.D. as an independent therapist to the boys. (Compl at 13:14-19, Ex. 3). Subsequently, in July 1993, Dr. Lewis testified at a proceeding before Judge Jordan that Plaintiff should temporarily lose custody of the children to their mother.

This action appears to be the source of Plaintiff's conspiracy claim against Dr. Lewis and his wife. The Lewis Defendants assert that the claim must fail pursuant to the doctrine of res judicata, and because the statute of limitations has expired. As this Court is convinced that the statute of limitations precludes this claim, no further inquiry is required. For the reasons cited previously in this order, as well as in other orders issued in this case by the Court, Plaintiff's claim against Defendants is subject to the statute of limitations and therefore must fail.

C. Plaintiff's Motion for Immediate Disqualification

Finally, Plaintiff has filed a "Motion for the Immediate Disqualification and Recusal of United States District Judge Larry R. Hicks and United States Magistrate Judge Robert A. McQuaid, Jr., Pursuant to 28 U.S.C. §455(a)(b)91)" (Docket No. 146). The Court has previously ruled on Plaintiff's motion to disqualify the magistrate judge (Docket No. 114), and find no grounds for reconsideration. Therefore, only Plaintiff's motion regarding this Court will be considered.

Under 28 U.S.C. §455(b), a justice, judge, or magistrate is required to recuse himself "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . ." Plaintiff contends that this Court's ruling are such that an "objective observer would more than entertain reasonable questions about [the] impartially" of this Court. (Pl.'s Mot. At 1:28-2:1). Plaintiff's equates this Court's lengthy consideration of the facts of the case and extensive legal analysis (*See Combined Orders*, Docket Nos. 136, 137, 138, 139, 140 & 141) with "fraud," for reasons which this Court can only conclude concern Plaintiff's belief that the Court's judgments are incorrect.

However, disqualification is not an available remedy for the Court's issuance of rulings which a party disfavors, nor does the Court's disagreement with a party's position create a reasonable question as to impartiality for the objective observer. The Court therefore denies Plaintiff's motion.

It is therefore ORDERED that Defendant Crowley's Motion to Dismiss (Docket No. 18) is GRANTED. As a housekeeping matter, it is further noted that no action is required to Plaintiff's "Response" (Docket No. 144) to this Court's order to show cause, which will be construed by the Court as a supplement opposition to Defendant Crowley's motion;

It is further ORDERED that the Lewis Defendants' Motion for Judgment on the Pleadings (Docket No. 135) is GRANTED;

It is further ORDERED that Plaintiff's Motion for Disqualification and Recusal (Docket No. 146) is DENIED.

IT IS SO ORDERED.

DATED this 26th day of January, 2005.

/s/ _____
LARRY R. HICKS

United States District Judge

APPENDIX D – JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA ENTERED AUGUST 19, 2005

Case No. CV-N-04-0059
Hon. Larry R. Hicks

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TYRONE DUFF,
Plaintiff,

v.

STATE OF NEVADA; et.al.
Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the judgment is in favor of the Defendants and against the Plaintiff.

August 19, 2005

/s/_____
LANCE S. WILSON
Clerk

/s/_____
WAYNE JULIAN
Deputy Clerk

APPENDIX E – ORDER ENTERED DECEMBER 12, 1994

Case No. D88-1238/Department 11
Hon. Scott T. Jordan

**IN THE FAMILY DIVISION
OF THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WASHOE**

TYRONE DUFF,
Petitioner,

v.
YOLANDA FOSTER, et.al.,
Respondent.

UPON THE ORAL MOTION of Kurt Mausert, Esq., the Court-appointed counsel for the minor children herein, and upon the record to date and for good cause (to wit: Mr. Mausert's relocation to New York State), and with no objection for any other party, it is hereby

ORDERED that Mr. Mausert's motion to withdraw as the counsel for the minor children is hereby granted, and that Mr. Mausert is relieved from any further responsibilities as attorney for said children.

Mr. Mausert has the thanks of the Court for his service in this case.

DATED this 9 day of December, 1994.

/s/_____
Scott Jordan
District Judge

CERTIFICATE OF SERVICE

I certify that on the 13th day of December, 1994, I deposited for mailing in the U.S. Mail in Reno, Nevada, with postage thereon fully prepaid, true and correct copies of the within document, addressed as follows:

A.Stanyan Peck, Esq.
485 W. 5th
Reno, NV 89503

Martin Crowley, Esq.
P.O.Box 415
Reno, NV 89504

/s/ _____
Kurt Mausert, Esq.

APPENDIX F – ORDER STRIKING FUGITIVE DOCUMENT;ORDER DENYING MOTION TO REMOVE RESTRAINING ORDER;ORDER TO RESUBMIT MOTION UPON PROPER SERVICE OF PROCESS FILED MARCH 5, 1998

Case No. D88-1238 & CV90-7020
Depart. No. 11

**IN THE FAMILY DIVISION
THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR
THE COUNTY OF WASHOE**

YOLANDA DUFF,
Plaintiff,

vs.

TYRONE GEORGE DUFF,
Defendant.

TYRONE GEORGE DUFF,
Applicant,

vs.

YOLANDA FOSTER,
Respondent.

The Court has reviewed: Defendant's Motion to Remove Restraining Orders filed October 12, 1997; Plaintiff's Opposition to Motion to Remove Restraining Orders, filed October 27, 1997; Defendant's Reply Motion to Remove Restraining Order filed February 11, 1998; Plaintiff's Motion to Strike file February 13, 1998; and all supporting documents on file.

Defendant asserts that he has been the subject of various restraining orders in this action over the past four (4) years which unduly prevent his freedom of movement and ability to engage in business in the Reno, Nevada area. Defendant requests that the Court immediately remove these restraining orders on the basis that they have been issued and renewed against him without due process or a showing that such restraints are warranted. The Conclusions of Law and Order entered July 26, 1993 on page 10 states:

> "Mr. Duff is hereby restrained from coming within five hundred yards (500) of the residence of Yolanda and William Foster, to wit, 1555 Ridgeview Drive #30, Reno, Nevada, or such other places as they may live and their places of employment, and neither he or anyone acting on his behalf shall have any contact with them; that Mr. Duff is further restrained from coming within 500 yards of Washoe County Social Services Department, the offices of any treating therapists for the minor children or the offices/ homes of Dr. Richard Lewis, Kurt Mausert, Esq. or A.Stanyan Peck, Esq."

In subsequent orders, Defendant asserts that he has further been directed to stay away from the minor children's school.

Defendant argues that as long as these restraining orders are in effect, the Court's January 9, 1998 Order confirming Defendant's joint legal custody of the parties minor children, CAMERON and AARON DUFF, the primary purpose of which was to allow Defendant access to the children's school records, will continue to frustrated because Defendant can not set foot upon the school grounds without fear of being held in contempt of Court.

Defendant argues that pursuant to NRS Chapter 33, all of the restraining orders currently in effect should be removed by the Court on the basis that the restraining order renewal expiration times have expired. Defendant further requests that the Court strike from the record Plaintiff's Reply to Opposition for Removing Restraining Order filed February 13, 1998 as a fugitive document pursuant to WDCR 12.

Plaintiff asks this Court to allow the restraining orders to remain in effect because Defendant has shown no signs of attempting to abate his aggressiveness and propensity toward violence, especially as directed against Plaintiff and the individual members of her family.

A moving party in an action must serve all parties to the action. The responding party shall have ten (10) days to respond to the motion, or thirteen (13) days if service is performed by mail. WDCR 12(2). The moving party may serve and file reply pints and authorities within five (5) day period, the matter may be submitted for decision. Any documents filed subsequent to the five (5) day time period the initial Motion without leave of the Court may be considered fugitive documents and stricken from the record. Accordingly, Defendant's request that the Court strike from the record Plaintiff's Reply to Opposition for Removing Restraining Order filed February 13, 1998 is granted. Plaintiff's "Reply" will not be considered in determining those issues now properly before the Court. This case presents the Court with a continuing controversy between a former husband and wife over the custody, support, and visitation of their minor children, CAMERON and AARON DUFF. The litigation dates back to Plaintiff's filing of a Complaint for Divorce on May 2, 1988. Since that time, there have been approximately four hundred sixteen (416) entries in the legal file, almost of which concern the care of the parties' minor children, with each parent setting forth reasons why he or she is the fit person

to have custody of CAMERON and AARON DUFF, or why the other parent fails in fulfilling his or her parenting role.

The policy in Nevada, codified at NRS 125.460, is that the best interests of children are generally served by a continuing relationship with both parents and a sharing of parental rights and responsibilities. However, Nevada has also established the overarching rule that the welfare of the minor children is the primary, paramount, and controlling consideration of the Court in all custody controversies. All other matters are subordinate. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice and there are numerous allegations of domestic violence and emotionally volatile acts.

The evidence presented throughout these proceedings leads to the conclusions that Defendant's controlling conduct gave rise to the initial TPO and Defendant, as Plaintiff correctly asserts, has shown no signs of attempting to abate or deter his behavior. In 1993, this Court directed Defendant to receive mental health counseling. There is no indication that Defendant has complied with this Court's Orders. Furthermore, since entry of the Restraining Orders at issue here, Defendant has become estranged from his sons as a result of his conduct toward them and Plaintiff. Other than the passage of time, there is no basis to believe that the restraining orders in effect in this case are no longer necessary. Based on the Court's continuing active involvement with this matter, the Court is convinced that the best interest of the minor children require that the Restraining Orders be maintained. Accordingly, Defendant's Motion to Remove Restraining Orders is denied.

Defendant to file a financial declaration within twenty (20) days of entry of that Order. Defendant filed his financial declaration with the Court, but there is nothing contained within the legal file to evidence that it was properly served on Plaintiff. Accordingly, Defendant shall serve a copy of his updated financial declaration on Plaintiff within ten (10) days of the entry of this Order and resubmit the issue of child support for this Court's determination pursuant to the laws of the State of Nevada.

IT IS SO ORDERED.

DATED THIS 3 DAY OF MARCH, 1998.

/s/_____
Scott Jordan
DISTRICT JUDGE

APPENDIX G – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AND ENTERED FEBRUARY 21, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-16812
D.C. No. CV-N-04-00059-LRH
District of Nevada (Reno)

TYRONE DUFF,
Plaintiff – Appellant,

v.

STATE OF NEVADA; et.al.,
Defendants – Appellees.

DECIDED: February 21, 2007

Before: GOODWIN, LEAVY, and FISTHER,
Circuit Judges

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed.R.App.P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed case.

APPENDIX H – LETTER FROM MARTIN CROWLE, ESQ. TO HON. SCOTT JORDAN, DATED October 10, 1995

American Legal Services
Martin G. Crowley, Esq.

P.O.Box 426
Reno, Nevada 89504
(702) 786-LAWS

October 10, 1995

Hon. Scott Jordan
Dept. 11
Second Judicial District
via hand delivery

Re: Foster v. Duff

Dear Judge Jordan:

Some very alarming matters came to my attention in this case last week and I reported the same to your secretary, Terri. Mr. Peck accused my client, Mr. Duff of being at the children's school in violation of restraining order. At the time that Mr. Peck called, Mr. Duff was several hundred miles from Reno and did not arrive until 4:00 p.m., just in time for the visit with Dr. Evarts.

The next day, after the second visit, Mr. Duff was greeted outside Dr. Evarts office by uniformed Reno Police. They stated that a green sedan with Washington plates was reported stolen and was to be found on that street in Reno. Only Mr. and Mrs. Foster knew that my client was driving a green sedan and only they knew it was at that location at that time.

We are requesting that you exercise your powers of the Court and investigate this matter and if you find that the Fosters have filed a false reports and allegations, that you take appropriate measures and sanctions. A request for restraining order will follow.

Sincerely,

/s/_____
Martin Crowley

cc: file, client, Stan Peck, Esq.

APPENDIX I – AFFIDAVIT OF A.STANYAN PECK DATED APRIL 7, 1999

Case No. D88-1238 & CV90-7020
Depart. No. 11

**IN THE FAMILY DIVISION
OF THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR
THE COUNTY OF WASHOE**

YOLANDA DUFF,
Plaintiff,
vs.

TYRONE GEORGE DUFF,
Defendant.

TYRONE GEORGE DUFF,
Applicant,
vs.

YOLANDA FOSTER,
Respondent.

State of Nevada
County of Washoe

I, A.Stanyan Peck, hereby swear under the penalty of perjury, that the following assertions are true and correct to the best of my knowledge:

1. That affiant is an attorney licensed to practice in all courts of the State of Nevada and is the former attorney for Yolanda Duff, now known as Yolanda Foster.

2. That affiant represented Ms. Foster for a substantial period of years proceeding August 1996 when affiant was permitted to withdraw as attorney of record.

3. That since affiant's representation of Ms. Foster, affiant has changed firms and all records associated with that representation are contained in a separate building and/or in storage.

4. That the Subpoena Duces Tecum served on the secretary for affiant requests documents which may or may not exist and which would be difficult and/or burdensome to retrieve.

5. That the Subpoena served issued by the Clerk includes a request for documents which would have been offered in support of a restraining order or orders issued long after affiant's withdrawal as attorney of record for Ms. Foster.

6. That affiant has no recollection of any documents ever having been offered to the court in support of any restraining orders and, if so, said documents would have been attached to moving papers.

7. That if affiant had received written communications from Ms. Foster concerning her relationship with Mr. Duff and/or events that had purported occurred between them, those documents would, in affiant's humble opinion, be privileged and not discoverable.

8. That no fees and/or costs associated with copying documents that may exist was provided with the subpoena at the time of service.

Further affiant sayeth naught.

Dated this 7th day of April, 1999.

/s/_____
A.Stanyan Peck

Subscribed and sworn to before me
this 7th day of April, 1999.
/s/_____
Kathleen L. Morris
Notary Public

KATHLEEN L. MORRIS
Notary Public – State of Nevada
Appointment Recorded in Washoe County
No: 93-0592-2 – EXPIRES DEC. 16, 2000

APPENDIX J – DEPUTY DISTRICT ATTORNEY BUFFY JO DREILING'S LETTER, DATED APRIL 19, 1999

Washoe County District Attorney
RICHARD A. GAMMAICK
DISTRICT ATTORNEY

April 19, 1999

Tyrone Duff
P.O.Box 2512
Bellingham, Washington 98225

Re: Subpoena Duces Tecum

Dear Mr. Duff:

I am a Deputy District Attorney assigned to represent Washoe County Department of Social Services. I have received a copy of the subpoena duces tecum in the case Yolanda Duff v. Tyrone George Duff, D88-1238, CV90-7020 which you sent to Michelle Lucier.

Your subpoena duces tecum requests copies of the following documents:

1. Supporting documents;
2. Police reports; and/or
3. Transcript of hearing,

to justify the court order of July 26, 1993 pertaining to the restraining order placed against you on behalf of Michelle Lucier and/or the Washoe County Department of Social Services, and the reinstatement of the restraining order on October 15, 1995 and March 5, 1998 on behalf of Michelle Lucier and/or Washoe County Department of Social Services.

I have reviewed the Washoe County Department of Social Services file pertaining to you, your children, and Ms. Foster (Duff). The file does not contain any of the documents requested by your subpoena duces tecum. Moreover, Ms. Lucier does not maintain a separate file and does not have any of the documents requested.

If you have any questions, please do not hesitate to contact me at (775) 328-3400.

Sincerely,

RICHARD A. GAMMICK
District Attorney

By /s/_____
BUFFY JO DREILING
Deputy District Attorney

APPENDIX K – KURT MAUSERT, ESQ.'S LETTER, DATED JUNE 21, 1999

Kurt Mausert
Counselor at Law

June 21, 1999

Amy Harvey, Clerk of Court
2nd Judicial District Court
Department 11
PO Box 11130
Reno, NV 89520

Re: Case No. D88-1238,
CV90-7020 (Duff v. Foster)

Dear Madam Clerk:

I was served with a Subpoena Duces Tecum in regard to the above-entitled case. No fees for mailing or copying or other witness fees accompanied this Subpoena. It is my understanding that without such fees, the Subpoena violates the appropriate rules under the Nevada Revised Statutes. However, as a courtesy to the court I have looked in my file and also caused my secretary to examine the file (see Affidavit of Ms. Hovious attached hereto). Also, pursuant to applicable Civil Practice Law and Rules in New York State, I affirm under penalty of perjury that I have personally examined the file and have been unable to find the requested documents.

I have not been involved in this case for nearly five years. In addition, my files have been transported from Nevada to the State of New York. It is possible that I never had a copy of the Restraining Orders, and it is also possible that said orders have somehow or other been misplaced in

the file or lost in moving.

I would note that any order from the court that was issued, including the Restraining Orders, would be in the court's file. In addition, such orders would have been served on Mr. Duff. I do not know why Mr. Duff is seeking to Subpoena from my files a document that should be in his and the Court's file.

If Mr. Duff again subpoenas documents from me without complying with the NRS, or uses a subpoena to procure documents more appropriately obtained from the court or his own file, I will be placed in the position of having to file a motion to quash. I will also seek attorney's fees and sanctions in order to compensate me for diverting my time and resources away from my regular practice. By copy of this letter, I am advising Mr. Duff of my position. I am a solo practitioner and cannot afford to have my time taken up by arguably improper requests from Mr. Duff.

Yours truly,

/s/_____
Kurt Mausert

KM/hh
c: Tyrone Duff

376 Broadway, Suit 2, Saratoga Springs, N.Y. 12866
518-587-5700 fax 518-587-0269

AFFIDAVIT

I, Holly Hovious, being more than eighteen years of age and duly sworn deposes and says that the following is true to the best of my knowledge, information, and belief:

On June 18, 1999 I thoroughly searched the ***Duff v. Duff*** file in Kurt Mausert's law office, and I was unable to locate the Order of Protection pertaining to Kurt Mausert.

/s/ _____
Holly Hovious

Sworn to before me
this 21 day of June, 1999.

/s/ _____
Kurt Mausert

Notary Public

Kurt G. Mausert
Notary Public, State of New York
Registration #02MA5062210
Qualified In Saratoga County
My Commission Expires June 24, 2000